In the Supreme Court of the United States

October Term, 1976

No. 76-804

GEORGE R. CAESAR, M.D.,
Petitioner,

vs.

LOUIS P. MOUNTANOS, as Sheriff of the County of Marin, State of California, et al.,
Respondents.

Amicus Curiae Brief of California Medical Association in Support of Petition for Writ of Certiorari to the United States of Appeals for the Ninth Circuit

HASSARD, BONNINGTON, ROGERS & HUBER

DAVID E. WILLETT, ESQ.

44 Montgomery St., Suite 3500
San Francisco, CA 94104
Telephone: (415) 982-8585

Attorneys for Amicus Curiae California Medical Association in support of Petitioner Dr. Caesar

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

TREATISES

In the Supreme Court of the United States

October Term, 1976

No. _____

GEORGE R. CAESAR, M.D.,
Petitioner,

vs.

LOUIS P. MOUNTANOS, as Sheriff of the County of Marin, State of California, et al.,
Respondents.

Amicus Curiae Brief of California Medical Association in Support of Petition for Writ of Certiorari to the United States of Appeals for the Ninth Circuit

STATEMENT OF INTEREST OF AMICUS CURIAE CALIFORNIA MEDICAL ASSOCIATION

Amicus curiae, California Medical Association ("CMA"), is a non-profit, unincorporated association consisting of more than 22,000 California physicians, and as such is the largest state medical asso-

ciation in the United States. Approximately 1,100 CMA members are psychiatrists, primarily engaged in the practice of psychotherapy. Petitioner George R. Caesar, M.D., is a member of the California Medical Association.

The CMA's primary purposes are to promote the science and art of medicine and the protection of the public health. The issue presented in this case is of crucial importance to the protection of the public health. Additionally, the ruling below will send physicians to jail if they fairly discharge responsibilities to patients attributable to the science and ethics of their profession.

Accordingly, we have reviewed the record on appeal in this case, and are familiar with the questions presented. On the basis of that review, counsel believes that the Supreme Court should grant certiorari in this case, and offer the following brief in support of Dr. Caesar's Petition for Writ of Certiorari.

ARGUMENIT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

INTRODUCTION

The Petition should be granted for these reasons:

1. The testimony which is sought from Dr. Caesar deals with the matters clearly within the most fundamental and protected right of personal privacy.

2. The very nature of psychotherapy is such that the patient is unable to understand the full implications should a psychotherapist be forced to disclose confidences in the course of litigation, and thus the patient cannot give knowing and informed consent to such disclosures.

3. Forcing the psychotherapist to testify violates the patient's constitutionally protected right of privacy, threatening great harm to both his individual well-being and the welfare of the community.

4. Such forced disclosure serves no compelling or even useful state interest.

II.

THE PATIENT'S RIGHT OF PRIVACY WOULD BE VIOLATED IF THE PSYCHOTHERAPIST WERE FORCED TO REVEAL INTIMATE DETAILS OF THE PATIENT'S SEXUAL, FAMILY, MEDICAL, OR OTHER PSYCHOLOGICAL PROBLEMS.

A person has the right to be free from unwarranted governmental intrusions into his or her privacy. (*Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965).) This right of privacy is so fundamental that the Court has attributed the source of the right variously to the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, as well as to the penumbra of the Bill of Rights. (See discussion in *Roe* v. *Wade*, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726, 35 L.Ed. 2d 147, 176 (1973).) As eloquently summarized by Justice Brandeis, dissenting in *Olm-*

stead v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956, 66 A.L.R. 376, 391 (1928):

> "The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

To delimit this right of privacy, the Court has defined certain 'zones of privacy' to protect individuals from state intrusion into intimate and personal activities. In the case of *United States* v. *Twelve 200 Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 127, n. 4, 93 S.Ct. 2665, 2668, n. 4, 37 L.Ed. 2d 500, 505, n. 4 (1973), the Court stated that the right of privacy "encompasses the intimate medical problems of family, marriage and motherhood." Surely a patient's discussion with his psychotherapist of such intimate problems as medical, family, marital or parental problems fall within the zone of privacy as contemplated by the Court. Indeed, it is through the discussion of such problems that the patient struggles toward healing in psychotherapy.

Consider, for example, a patient who seeks help for a psychosexual disturbance. In the course of treatment, the patient would surely reveal his most intimate secrets to the psychotherapist, if therapy is to be effective. The Supreme Court has already held that an individual's sexual relations are not properly probed by the State. *Griswold* v. *Connecticut*, *supra*; *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 (1972). Are an individual's *thoughts* of sex *less* private than the sexual act itself? When discussed in the course of psychotherapy, do such thoughts lose their intimate character? Surely, the inner thoughts, fancies, dreams, and depressions of individuals are deserving of the most sensitive protection under the constitutional right of privacy. Accordingly, they should not be invaded by requiring psychotherapists to disclose confidential communications.

Additionally, a particularized form of the constitutional right of privacy is evolving to protect the patient-physician relationship. This medical right of privacy would be violated in the present case if Dr. Caesar were required to testify. (*Planned Parenthood of Central Missouri* v. *Danforth*, ... U.S. ....., [44 U.S.L.W. 5197] (1976); *Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973) (See especially, Douglas, J., concurring at 410 U.S. 209, et seq.); *Doe v. Bolton*, 410 U.S. 170, 93 S.Ct. 739, 35 L.Ed. 2d 201 (1973).) Under this medical right of privacy, a patient, in consultation with, and under

the care of, his physician may make important medical determinations free of governmental interference. (*Doe* v. *Bolton*, *supra*, and *Planned Parenthood of Central Missouri* v. *Danforth*, *supra*.)

III.

THE PSYCHOTHERAPEUTIC PROCESS REQUIRES CONFIDENTIALITY.

It may well be that the lower courts' insistence on forcing testimony from the psychotherapist is attributable to unfamiliarity with psychotherapy itself. Psychotherapy has recently been defined as "any procedure delivered by a licensed mental health professional that (1) relies on "*talking*" as the major component and (2) is based on any technique directly taught or simulated through training at a medical or other professional school." (Fix & Haffke, *Basic Psychological Therapies: Comparative Effectiveness*, 24 (1976).

Indeed, psychotherapy is a facilitative communication relationship in which the psychotherapist and patient interact. It is upon the interaction of psychotherapist and patient that the psychotherapeutic "healing" depends. The process of psychotherapy, however, is not one of simple exposition by the patient at the prodding of the psychotherapist, or the question and answer session which lawyers attuned to depositions may have in mind. (See, London, *Modes and Morals of Psychotherapy*, 12 (1964).)

Psychotherapy seeks to resolve the innermost conflicts of disturbed or distressed individuals. Through talking, the patient is encouraged to explore, expose, confront and cope with sources of his psychological problems. The most sensitive and painful areas of human emotions and experiences are often laid bare. Sources of repressed guilt or shame, latent longings —matters buried deep in the subconscious—are all called out and examined by the psychotherapist. As stated in *Taylor* v. *United States*, 222 F.2d 399, 401 (D.C. Cir. 1955): "The psychiatric patient confides [in his therapist] more utterly than anyone else in the world. . . . [H]e lays bare his entire self, his dreams, his fantasies, his sins, and his shame."

During the course of life, the mind defensively represses uncomfortable or distressing experiences into the subconscious. Often these experiences are a source of shame or anxiety to the patient. If the guilt or psychological discomfort of such experiences is so great that the patient's conscious mind suppresses it, then surely the patient does not desire to have this problem aired in the public record. As stated by Judge Hufstedler in her dissent below:

> The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle to remain sick, rather than to reveal those thoughts *even to himself*. The possibility that the psychotherapist could be compelled to reveal those

communications to anyone, let alone broadcast them in a legal proceedings, can deter persons from seeking needed treatment and destroy treatment in progress. (See, e.g., *Taylor* v. *United States, supra;* J. Katz, J. Goldstein & A. Dershowitz, *Psychotherapy, Psychoanalysis and the Law*, 726-27 (1967).)

Judge Hufstedler's recognition of the role of the subconscious—that which the patient will not recognize or admit *"even to himself"*—is crucial. The mental mechanisms by which each of us cope with life —successfully or unsuccessfully—are internal mechanisms of control unconsciously selected and operating automatically. The mechanism unconsciously selected to meet emotional needs and stresses and to provide a defense against anxiety, the extent of its employment and the degree to which it distorts the personality, dominates the behavior and disturbs adjustment, determine the measure of mental health. In his interaction with the patient, the psychotherapist searches for information about these subconscious processes. By their very nature, the patient does not recognize or understand processes as they take place in his own case, the significance of underlying information, or other factors which are significant to the psychotherapist. The patient does not have the psychotherapist's perspective on the course of therapy. Yet, those who would oppose this Petition would place the burden on the patient to protect the confidentiality of the relationship. The position of the opposition is

that a victim of an accident who suffers emotional problems and seeks psychotherapeutic help then waives all confidentiality by subsequently bringing suit. The opposition would say that the patient/victim controls the choice of disclosure. Yet the patient does not understand the psychotherapeutic interaction which is occurring in his case and thus cannot judge the impact of disclosure. Indeed, the patient probably does not know the significance of all he is saying in his therapy sessions. The patient, therefore, is wholly unable to give knowing and informed consent to subsequent disclosure by the psychotherapist of matters revealed by the patient to the psychotherapist. Thus, the psychotherapist must, for therapeutic as well as constitutional reasons, retain discretion to preserve the confidentiality of patient communications.

IV.

PRIVATE COMMUNICATIONS ARE THE ESSENCE OF PSYCHOTHERAPY.

Psychiatry, including psychotherapy, undoubtedly is still in its infancy as a science. In recent years, great strides have been made in remedying the hopelessness, fear, and despair afflicting the mentally ill. Psychotherapy is no longer reserved to the institutionalized patient. Increasing recognition of emotional illness means that anyone may be seen by a psychotherapist for professional treatment. The value of such treatment probably can be appreciated only by those who have sought such services, whether for

themselves or for family members. The importance of such professional treatment, to individuals or to the community, is self-evident. The relationship of the patient's right of privacy to the provision of this treatment is summarized by Dr. Caesar's attorney in making part of his objections to the questions as follows:

> "Dr. Caesar views his position as a psychotherapist administering such treatment as that of a healer in which his own personality and his own personal interaction with the patient are the tools of healing, and to force his personality to be put at a distance from the patient in any way in this manner would be to destroy the opportunity to be a healer."
> (Deposition of Dr. Caesar at page 15.)

At the subsequent hearing on Dr. Caesar's refusal to answer the questions, the doctor eloquently stated why he, as a psychotherapist, could not discuss the innermost secrets of his patient in this case.

> "Although I feel that any breach of confidence without my patient's consent is harmful to my relationship with my patient, *I have*, in compliance with your order, *answered questions when I felt the answer was not harmful in a more direct way other than simply by breaking the confidence.*
>
> In other words, I have gone through a somewhat difficult process of deciding *which answers would, in my opinion, be so harmful*

> *as to constitute a serious breach of the ethics of my profession. These questions I have refused to answer.*
> (Emphasis added, Transcript of Hearing p. 8.)
>
> * * *
>
> *Unlike other physicians . . . the relationship between the patient and the [psychotherapist] cannot be separated from the treatment itself. It is an integral part of that treatment.* If a neurosurgeon must report his objective findings in a case, if this goes against his patient's interest, his relationship with the patient may suffer, but the physical treatment given the patient will not be affected, but if a psychiatrist does the same thing, the treatment will be damaged, or destroyed, because the patient's trust in his doctor will be impaired by the disclosures, and this trust is an integral part of the therapeutic effect of the relationship on the patient.
>
> * * *
>
> Even if a patient never consults a particular psychiatrist again, his behavior in the courtroom can influence the patient's attitude toward the profession, and make him reluctant to consult another psychiatrist; even if he needs to do so."
> (Emphasis added; Transcript of Hearing pp 11-13.)

In short, Dr. Caesar steadfastly believed that disclosure of confidential information not only jeopardized the patient's constitutional right of privacy, but

also jeopardized the patient's health. As Dr. Caesar stated in his deposition testimony,

> "[to answer] would violate the ethics of my profession . . . the Hippocratic Oath and what has been called the first principle of medicine, *primum non nocere*, which literally translated means 'first no harm'."

The doctor, therefore, seeks to abide by the highest standards of medical ethics which require that the physician not do anything which would harm the patient. Those who would oppose the petition seek to compromise those standards.

V.

THE MATTERS COMMUNICATED FROM PATIENT TO PSYCHOTHERAPIST ARE OF SUCH A PRIVATE NATURE THAT THEY SHOULD BE PRIVILEGED.

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (*Bates* v. *Little Rock*, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed. 2d 480, 486 (1960).)

Physicians and others practicing psychotherapy are particularly incensed by the invasion of patient privacy for two reasons. First, it threatens great injury to the patient. Secondly, such invasion is unlikely to produce information of any real utility in the process of litigation. This latter factor is particularly frustrating to the psychotherapist, who recognizes that psychotherapy is an inexact science which depends heavily on trained but subjective evaluation and personal interaction between psychotherapist and patient. As a consequence, the psychotherapist can provide only minimal material which ought to be thrown into the balance in deciding lawsuits.

Chief Justice Burger, in an article critical of psychiatric opinions as an aid to determination of guilt or innocence, made observations which are probably applicable to psychiatry generally, and especially to psychotherapy, insofar as the legal process is concerned:

> "At best psychiatry is now an infant among the family of sciences. Just as the law can lay no valid claim to being truly scientific, neither perhaps can psychiatry and psychology; they may be claiming too much in relation to what they really understand about the human personality and human behavior. The adversary process functions fairly well—and that is all anyone can expect—using engineering experts and others in the physical sciences to explain and measure physical injuries and the causes of such injuries. In most of these areas there are concrete and objective factors to rely upon. The psychiatrist, on the other hand, presently has few such advantages, and the delicacy and refinement of his evaluations are all too often unsuited to the 'black and white,' 'all or noth-

ing' approaches of strongly partisan adversaries in a courtroom." 28 Fed.Prob. No. 2, p. 3 at p. 7 (1964).

In short, psychotherapy is as much a subjective art as an objective science. The raw material of psychotherapy consists of potentially the most embarrassing and sensitive feelings and thoughts of the patient. There are numerous schools of psychotherapy, each with its own set of interpretations. (See, e.g., Harper, *Psychoanalysis and Psychotherapy: 36 Systems* (1959). One wonders if the therapeutic analysis, which can be of great subjective value to the patient, can ever be of probative, objective value to a court. Amicus curiae suggest that this subjective realm be left to the privacy of the psychotherapist-patient relationship.

CONCLUSION

Lawyers, possessed of natural curiosity and the desire to leave no stone unturned in the discharge of an advocate's responsibility, tend to regard psychotherapists as they would other witnesses who have attended the patient. Judges and lawyers alike, respecting a traditional approach to the production of evidence, are impatient with the psychotherapists who refuse to behave like any other witnesses. The psychotherapist is criticized for "playing God," abrogating for himself the court's own role, in deciding what he will disclose. Psychotherapists are accused of failing to understand that confidentiality of communication is a right that belongs to the patient, and not the therapist,—a right that can be waived by the patient.

In fact, psychotherapists, particularly psychiatrists, understand that the legal right which is primarily at issue is not simply one of confidentiality of communication, but rather a larger, more firmly rooted right. It is the constitutional right of privacy. In respecting that right, the psychotherapist adheres to a responsibility incumbent upon any citizen, but particularly binding upon a professional whose most traditional obligation is "*first no harm*". No court would permit direct exploration of the most private thoughts of an individual who exercises his right of access to the judicial system. To permit such exploration through the interrogation of the psychotherapist is an even greater invasion of the individual's right of privacy, because that exploration is made possible by the coerced assistance of a professional able to describe subconscious processes which the individual himself could not and would not expose. The violence of this assault upon the right of privacy, and the potential consequences, to the patient and to society, have left Dr. Caesar and others in his circumstances without honorable choice. Dr. Caesar has not placed himself outside the law. He recognizes—as did Judge Hufstedler—that the fundamental right involved is a constitutional right, reserved to the individual who was his patient, which must be zealously protected.

Accordingly, we support this petition for certiorari, not simply for the protection of psychotherapists, but for the protection of the individual, and society generally.

Dated: December 10, 1976.

Respectfully submitted,

HASSARD, BONNINGTON, ROGERS
& HUBER
By DAVID E. WILLETT
Attorneys for Amicus Curiae California Medical Association in support of Petitioner Dr. Caesar

STATE OF CALIFORNIA }
COUNTY OF SAN FRANCISCO } ss.

AFFIDAVIT OF SERVICE BY MAIL

Joanna Katayanagi being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of San Francisco County and not a party to the within action.

That affiant's business address is

44 Montgomery St., Suite 3500
San Francisco, California 94104

That affiant served 2 copies of the attached Amicus Curiae Brief by placing said copies in an envelope addressed to

David J. Costamagna, Esq.
4340 Redwood Highway
San Rafael, CA 94903

James D. Hammond, Esq.
Bacon, Stone, O'Brien & Hammond
One Post Street, Suite 3250
San Francisco, CA 94104

Douglas J. Maloney, Esq.
342 Civic Center
San Rafael, CA 94903

Raymond E. Bright, Esq.
463 Pacific Avenue
San Francisco. CA 94133

Irwin Leff, Esq.
Rosenthal & Leff, Inc.
100 Bush Street, Suite 428
San Francisco, CA 94104

George Frampton, Esq.
Rogovin, Stern & Huge
1730 Rhode Island Ave. N.W.
Washington, D.C.

Kurt W. Melchior, Esq.
Severson, Werson, Berke & Melchior
One Embarcadero Center, 25th Floor
San Francisco, California 94111

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on December 13, 1976, deposited in the United States mail at San Francisco, California. That there is delivery service by the United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 1976, at San Francisco, California.

Joanna Katayanagi